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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 752

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

OPPOSITION TO THE MOTION TO AFFIRM

Appellees' motion alleges that the question presented by this appeal is "so unsubstantial as not to need further argument" (p. 2), then proceeds to show that the interests affected by this proceeding are indeed substantial and nowhere disproves that the ruling below imposes a substantial burden on the administrators of the Interstate Commerce Act. It may be that no further argument is needed in this proceeding for the reason that the error below is so patent.

The decision below has three elements, any one of which imposes new and burdensome notice requirements on the Commission in grain-rate proceedings. The court below requires "clear, decisive notice," of what is "contemplated" by the Commission, that is predecisional notice of the likely outcome of the rate proceeding. It holds in the same sentence that the relief here granted, which in fact followed the suggestion of the Chicago and North Western Ry. Co. made during the course of the proceeding, is an "enlargement of the issues in the proceeding." Finally, it would require notice, not only of the relief "contemplated" by the Commission, but of the "proposed amendatory action in Docket 17000, Part VII," as if such additional action was necessary as a matter of law, rather than administratively convenient, before the Commission could lawfully vacate the rate-break rule. (J.S. 6a). In each of these facets of the decision, the court below clearly erred.

Just as in *Board of Trade* v. *United States*, 314 U.S. 534, 547, so here, "the Commission had several choices before it." Appellees claim this Court made that statement with respect only to the general investigation (164 I.C.C. 619), and not with reference to the subsequent complaints, such as are here involved. Yet, immediately following this Court's reference to the general investigation it repeated that "all of the proposed remedies" were properly before the Commission when it decided to give the rate-break rule a "reasonable trial" in the complaint proceeding, 229 I.C.C. 9 (314 U.S. at 547-48).

No notice was required of the formal reopening of Docket 17000, Part VII. The appellees were given notice of the subject matter of the proceeding in the complaints, and repeated notice during the course of the proceeding that at least the North Western desired relief from the entire rate-break requirement, albeit under the docket numbers of the five complaints. The Commission's order under these docket numbers was legally enforceable, and its choice to preserve an orderly docket by further amending orders in Docket 17000 made no further substantive change. The amendment of orders in Docket 17000, Part VII, was a procedural order which Section 4(a) of the Administrative Procedure Act expressly exempts from its notice requirements (60 Stat. 238, 5 U.S.C. 1003(a)).[1]

We demonstrated in the jurisdictional statement that appellees were on actual notice that the rule might be vacated so as to allow the railroads to propose changes in rates on a case by case basis. The rule was attacked in the complaints served on the appellees; and the North Western specifically requested vacation of the rule. Appellees point to various portions of the Commission's report to suggest that the complaints were considered on narrower grounds (Motion, p. 7). Even if it were true that few specific rates (the "rate break combinations") were attacked

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[1] It might be further argued that the decision vacating the rate-break rule under the docket numbers of the five complaints was also a procedural change, for it approved no change in the status quo, but was made to encourage the filing of rates for review on a case by case basis. (322 I.C.C. at 774-75; C. & N. W. J.S. App. C., at 774-75).

in the complaints, this would not be material; for, as the Commission found, "certain complainants allege that the absolute rate-break rule . . . is an unjust and unreasonable regulation" (322 I.C.C. at 757; C. & N.W. J.S., App. C., at 757), and broadly requested relief from such regulation.[2]

Appellees were on actual notice throughout this hard-fought, five-year proceeding, that the Commission might vacate the mandatory rate-break order to allow greater initiative among the grain-carrying railroads, including the appellee railroads, to propose innovations in the grain rate structure. Appellee railroads apparently do not want this freedom of initiative, but neither they nor any other appellee are prejudiced in having it, nor by the manner in which it was granted.[3]

We respectfully submit that for the Commission to discharge its "duty of being responsive to the dynamic character of transportation problems," as this Court emphasized in *Board of Trade* (at 546), it must retain a wide choice of remedies at the decisional

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[2] It is also true that the Department of Agriculture requested a reopening of Docket 17000, Part VII, during the present proceeding, which was denied; but the petition was denied for the reason that the Department had requested a complete investigation of the grain rate structure, and not merely an investigation of the rate break requirement.

[3] Appellants renew their contentions, that the decision below unlawfully imposes procedures more exacting than the Federal Rules of Civil Procedure (*cf. L. & N. R.R.* v. *Sloss-Sheffield Co.*, 269 U.S. 217, 227); and that such decision flatly contravenes the ruling of the Supreme Court in *Civil Aeronautics Board* v. *State Airlines*, 338 U.S. 572.

stage of these complex and fluid grain rate adjustments. The decision below unduly narrows the choice of remedy and imposes new and heavy decisional and predecisional burdens on the agency in these cases.

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